DATE: February 14, 1996
CASE NO. 93-ERA-24

IN THE MATTER OF

CALVIN J. CREEKMORE,

COMPLAINANT,

v.

ABB POWER SYSTEMS ENERGY SERVICES, INC.,

RESPONDENT.

BEFORE: THE DEPUTY SECRETARY OF LABOR[1]

DECISION AND REMAND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5251 (West 1994).[2] Complainant, Calvin J. Creekmore, alleges that Respondent, Power Systems Energy Services, Inc. (PSESI),[3] violated the ERA when it laid him off from his managerial position. The Administrative Law Judge (ALJ) found that Respondent violated the Act and ordered PSESI to pay back pay, front pay in lieu of reinstatement, reimbursement for certain monetary losses, compensatory damages, costs, and attorney fees. I agree with the ALJ's conclusion that Creekmore's layoff violated the ERA, clarify the measure of some of the damages to which he is entitled, and remand to the ALJ for a recommendation on the amount of back pay.

BACKGROUND

PSESI is a provider of temporary manpower services to the power production industry, including nuclear power plants. As PSESI's Manager of Quality Services, Creekmore provided temporary personnel in the quality assurance/quality control (QA/QC) field to nuclear power plants to staff them during shut-down periods.

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T. 74-76, 295-296. Creekmore worked in Windsor, Connecticut. T. 65.

In the latter part of 1991, Creekmore informed ABB's southern regional client manager, George Griffiths, that he would

like to return to his native region of Tennessee. T. 153. Creekmore discussed with Griffiths the possibility of ABB creating for him the position of client manager for the Tennessee Valley Authority (TVA), which operates several nuclear plants. *Id.* When Griffiths asked TVA employee Randy Wood whether he had anyone to suggest for such a position, Wood recommended Creekmore. T. 1272-1273. Griffiths later told Wood that Creekmore would be the new TVA client manager. T. 1273. Creekmore and Griffiths discussed a raise in salary upon Creekmore taking the position, T. 153-154; *see also* T. 779-780, and Creekmore sought information on the company's relocation policy. T. 154.

Nuclear Regulatory Commission (NRC) regulations require the completion of an extensive background investigation prior to granting personnel unescorted access to a nuclear facility. T. 92-93. PSESI's security group handled the access screening program and cleared personnel to receive a "good guy" letter authorizing unescorted access. T. 92-94.

In preparation for an upcoming outside audit, PSESI's president, Lionel Banda, assigned Creekmore to oversee an internal audit of the access screening program in April 1992. T. 91. Creekmore assigned Jack Mayoros and another employee to conduct the audit. T. 97-98, 709. After overhearing a conversation, Mayoros suspected that, contrary to the regulations, some good guy letters were being sent to client nuclear plants prior to PSESI receiving all of the necessary background checks on the employees. T. 710-714.

Creekmore learned about the improperly issued good guy letters when he returned to the office after a few days' absence. T. 100-101. The security group's direct manager, Roy Newholm, admitted to Creekmore that he knew good guy letters had been issued prior to the completion of the necessary background investigation. T. 104-105. Indeed, two investigators said they were instructed to issue the good guy letters first and later backdate reference checks when the investigations were completed. T. 107-108, 715; CX 26.

Creekmore gave Banda documents and a memorandum recommending that PSESI immediately use the correct date on background check documents, notify a client nuclear plant about the security program lapses, and conduct an audit to determine the severity of the problem. CX 27. According to Creekmore, Banda told him to get rid of the documentation because it was "ammunition," T.

118-119, 121, but Banda denied the incident. T. 536-537.

Outside auditors confirmed Creekmore's conclusions of serious violations of security regulations. T. 121. Creekmore reported to Banda and Bill Skibitsky, the president of PSESI's parent company, that security group supervisors had instructed investigators to skip certain procedures in verifying background references. T. 123-125; CX 21. Banda told PSESI staff that when speaking with client utilities, they should refer to the security department problems as "omissions and inconsistencies as opposed to serious violations involving falsifying records." T. 127. At one point, Banda also told PSESI employees not to communicate with an NRC investigator because she was close to finding the

"root cause" of the security group problem. T. 146-147.

In view of the security department lapses, PSESI reprimanded and suspended Newholm and a security group supervisor. T. 599-600, 802. Mayoros replaced Newholm as Acting Manager of Security. T. 723; CX 12.

Banda assigned Creekmore to head the verification team, which reviewed the files, determined whether any temporary personnel provided through PSESI should be removed from a nuclear site, and rewrote the procedures to avoid a recurrence of the problem. T. 546-547. Aware of Creekmore's interest in transferring to Tennessee, Banda asked him not to leave his job while he was working on fixing the security department problems. T. 156, 159, 567. Creekmore was unable to sell QA/QC services because he spent the summer of 1992 working long hours to remedy the problems and did not even take a vacation. T. 150, 152; CX 30. QA/QC sales continued to decline.

That summer, Creekmore found it difficult to contact Griffiths about the TVA client manager position. T. 161. He also noticed a coldness in Banda's attitude toward him. T. 161. Banda informed Creekmore that PSESI was "getting out" of the QA/QC business and that he was being laid off in September 1992 along with several others in his department. T. 170.

According to Creekmore, Griffiths said that he was shocked about the layoff and that Creekmore had been made the "fall guy" for the security problems. T. 204-205; CX 45. Griffiths did not recall the conversation, however. T. 997. The TVA client manager position never was authorized.

PSESI folded the QA/QC business into the Engineering and Training Services division, headed by William Chalfant. T. 446. According to the company, it no longer actively sold QA/QC services. T. 459-460. However, after Creekmore's layoff, Newholm was reinstated and selling QA/QC services was part of his duties. T. 210-213.

Creekmore received severance pay equal to his full PSESI salary for approximately nine months following his layoff. T.

501-502; RX 23. He found temporary consulting work that required him to be away from home for long periods. T. 198. Another ABB company considered Creekmore for a management opening at the same pay grade as his former position. T. 201, 701. Creekmore was unable to leave his consulting job on the suggested day for the ABB interview, and arranged a later interview date. T. 201, 698. In the meantime, The Atlantic Group (TAG) offered Creekmore a permanent position and told him he must accept or reject the offer by a date prior to the scheduled interview with ABB. T. 202-203. Creekmore accepted TAG's definite offer and informed ABB that he no longer was a candidate for its position. T. 203, 699.

Creekmore timely filed this ERA complaint. In a Recommended Decision and Order (R. D. and O.), the ALJ found that PSESI violated the ERA, recommended certain remedies and damages, and directed Creekmore to submit additional evidence to clarify certain elements of damages to which he might be entitled. *See* R. D. and O. at 48, 50-51. After receiving responses, the ALJ issued a Recommended Decision and Order on Motion for

Reconsideration (RDO-MR), recommending payment of additional damages and attorney's fees.

PRELIMINARY ISSUE

PSESI has asked me to take notice of the NRC's investigative report concerning Creekmore's complaint that he was laid off for raising concerns regarding the premature issuance of good guy letters. Creekmore opposed the motion.

The investigation report is a relevant public document of a Federal agency and I will take notice of it. *See Mosbaugh v. Georgia Power Co.*, Case Nos. 91-ERA-1 and 91-ERA-11, Dec. and Order of Remand, Nov. 20, 1995 (authorizing record to be supplemented with NRC investigation report concerning the same complaint). The NRC report shall be placed with the record of this case. For the reasons discussed below, I disagree with the conclusion in the NRC report that Creekmore's layoff was not motivated by his raising concerns regarding the good guy letters.

DISCUSSION

Where a respondent has introduced evidence to rebut a *prima facie* case of a violation of the ERA's employee protection provision, it is unnecessary to examine the question of whether the complainant established a *prima facie* case.

Carroll v. Bechtel Power Corp., Case No. 91-ERA-0046, Final Dec. and Order, Feb. 15, 1995, slip op. at 11 and n.9, *petition for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995). "The [trier of fact] has before it all the evidence it needs to determine whether 'the defendant intentionally discriminated against the plaintiff.'" *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450

U.S. 248, 253 (1981)).

The relevant question in this case is whether Creekmore established by a preponderance of the evidence that his protected activities were a contributing factor in the layoff decision. 42 U.S.C. § 5251(b)(3)(C) (West 1994). Even if Creekmore made that showing, PSESI still would not be liable under the ERA if it demonstrated by clear and convincing evidence that it would have laid off Creekmore in the absence of his protected activities. 42 U.S.C.A. § 5851(b)(3)(D). *See Yule v. Burns Int'l Security Svc.*, Case No. 93-ERA-12, Final Dec. and Order, May 24, 1994, slip op. at 7-8. PSESI also may not be found liable if Creekmore, "acting without direction from his . . . employer . . . deliberately cause[d] a violation of any requirement of the" ERA. 42 U.S.C.A. § 5251(g).

In reaching the recommended decision, the ALJ viewed the evidence in the light most favorable to Creekmore. *See, e.g.*, R. D. and O. at 19 ("This closed record, viewed most favorably toward Complainant and the allegations he has made, leads to the conclusion that Complainant was discharged because of his protected activity."). *See also* R. D. and O. at 20 ("In concluding that the Complainant has established a violation of the ERA, I have resolved all doubts in his favor, especially since the employee protection provision of the Act is a most

important part of the statute. . ."). Since there was a full hearing with presentation of evidence by both parties, it was not correct to view the evidence more favorably toward the complainant.[4] Accordingly, I have examined the evidence neutrally, without viewing it favorably toward either party.

1. Liability under the ERA

One way for a complainant to establish that his protected activities were a contributing factor in the adverse employment action is to show that the reason the respondent gave for taking the action was pretextual. *Yule,* slip op. at 6. Creekmore maintains that Banda told him that PSESI was "getting out" of the QA/QC business and therefore was laying him off. T. 170-171. Dennis Silver, who was laid off at the same time, confirmed Banda's use of the term. T. 1096.

Banda, however, testified that he told Creekmore that the company was "restructuring" the QA/QC business line. T. 566. A memorandum from Banda to Skibitsky, dated four days after Creekmore learned about his layoff, explained the proposal to restructure the QA/QC business. T. 563-564; RX 16.

The ALJ credited Creekmore's testimony that Banda used the term, getting out of the business. As the ALJ explained, R. D. and O. at 20, although Banda initially said he did not recall using the words, "getting out" of the QA/QC business, T. 566, he later said that the company was "(g)etting out of the -- getting

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out of the issues." T. 567. Finally, Banda admitted that he may have said "getting out of the business" when informing Creekmore about the layoff, but he had intended to say "restructuring." T. 601-602.

I too credit Creekmore's version that Banda told him that he was being laid off because the company was getting out of the business. Banda apparently desired to hide the reality of the restructuring plan from Creekmore, who had insisted on informing the client utilities about the security department's failures.

The shift in explanation from quitting the business, told to Creekmore and Silver, to restructuring, told to PSESI's parent company, indicates pretext. *See Hobby v. Georgia Power Co.*, Case No. 90-ERA-30, Dec. and Remand Order, Aug. 4, 1995, slip op. at 21 (finding no legitimate, nondiscriminatory reason for a supervisor rating the complainant's performance as "excellent" and "commendable" and later testifying that he never had a high opinion of the complainant's skills). *See also Edwards v. United States Postal Svc.*, 909 F.2d 320, 324 (8th Cir. 1990) ("[i]n light of this record, filled with changing and inconsistent explanations, we can find no legitimate, nondiscriminatory basis for the challenged action that is not mere pretension.").

I agree with the ALJ that despite protestations to the contrary, PSESI continued to seek external QA/QC business after Creekmore's layoff by bidding on contracts with utilities that were not among its existing QA/QC clients. R. D. and O. at 14-15; see also T. 210, 212-213, 216-218; CX 57-59. Newholm acknowledged that PSESI had no obligation to make those bids. T. 826.

Contrary to PSESI's argument, Resp. Br. at 32-33, I do not

find that the facts of *Shusterman v. Ebasco Svcs., Inc.*, Case No. 87-ERA-27, Final Dec. and Order, Jan. 6, 1992, *aff'd mem., Shusterman v. Secretary of Labor,* 978 F.2d 707 (2d Cir. 1992), are analogous to this case. In *Shusterman*, slip op. at 10, the Secretary found that the four-year hiatus between the complainant's protected activity and his layoff indicated that the protected activity did not motivate the layoff. In this case, however, Creekmore's layoff occurred within five months of his protected activities, and therefore the inference of causation was strong.[5] *See* R. D. and O. at 32; *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (temporal proximity is sufficient to raise inference of causation); *Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-36, Sec Dec., Apr. 7, 1992, slip op. at 11-12, *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin,* No. 92-ERA-4567 (5th Cir. Feb. 19, 1993) (causation established where seven or eight months elapsed between protected activity and adverse action). In view of the demonstration of pretext, I find that

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Creekmore established by a preponderance of the evidence that his protected activities were a contributing factor in the layoff decision and that the real reason he was laid off was his engaging in protected activities. *See St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2752 (1993).

PSESI contends that the layoffs of Creekmore and four other employees in September 1992 "were the initial step in a permanent and financially necessary restructuring" due to a business downturn. Resp. Br. at 37-38. Creekmore's 1991 performance evaluation noted that despite his great efforts, the QA/QC business met only 37 percent of its targeted sales that year. T. 766-767; RX 20. Further, between 1987 and 1992, the profit margins in that line had decreased from an average of 19 percent to 7.5 percent. T. 351, 551, 769-771; RX 25. Obviously, the combination of low sales and diminishing profit margin reflected a serious downturn in the business line. Banda, who became president of the company in April 1992, emphasized the need to reduce costs to stem the decrease in profits. T. 552-553; RX 31, RX 34. I find the evidence of a decline in PSESI's external QA/QC business convincing.[6]

Even though PSESI needed to lay off personnel as a means to decrease expenses, I am not convinced that PSESI would have chosen Creekmore for layoff if he had not engaged in any protected activities. Creekmore regularly received very positive performance reviews, *see* CX 36-CX 38, and acted in behalf of former PSESI president Wyvill during his absences from the office. CX 33-CX 34. Despite Creekmore's strong performance and 27 years with PSESI and its predecessor, PSESI laid him off.

Prior to the September 1992 layoffs, Newholm's duties included assisting Creekmore in selling QA/QC services to external clients. T. 787, 799-801, 823. Therefore, laying off Newholm would have helped to reduce costs in the QA/QC business line to some extent. Since the company retained Newholm while it laid off Creekmore, it had sufficient funds to retain one of the managers who had helped to procure external QA/QC contracts.[7]

Banda admitted that Newholm's performance was not good,

T. 609, and that his reputation in the industry suffered because he did not comply with procedures. T. 657. Notwithstanding Newholm's reprimand and suspension, PSESI reinstated him and assigned him to work on QA/QC business following Creekmore's layoff. The company thus rewarded Newholm, the manager who both condoned and ordered the premature issuance of good guy letters, R. D. and O. at 30, and harmed Creekmore, the manager who insisted on rectifying the problem. I find that PSESI did not demonstrate by clear and convincing evidence that it would have laid off Creekmore even if he had not engaged in protected activities. PSESI therefore is liable under the ERA.

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Newholm claimed that Creekmore was aware of the practice of issuing the letters prematurely. T. 1329, 1335-1336, 1338. Another PSESI witness, former Manager of Security and Recruiting Deborah Nichols, testified that Creekmore suggested that the company issue good guy letters prior to the completion of the background investigation.[8] T. 422-424. In addition, Richard Schroeder, the Vice President of Quality and Operations of PSESI's parent company, testified that Creekmore admitted that he knew about the practice. T. 962.

Creekmore, however, adamantly denied either knowing about the practice of backdating references or ordering employees to issue the good guy letters prematurely. T. 1133, 1136. Based on a close working relationship, Dennis Silver testified that Creekmore did not and would not have promoted or condoned such practices. T. 1081. Another former coworker, Richard Sokolowski, testified to the same effect. T. 1063-1064, 1071.

In light of this contradictory evidence, the ALJ found that Creekmore "did not order, condone or acquiesce in such security violations. . . ." R. D. and O. at 22. The ALJ found Creekmore's testimony more credible than that of PSESI's witnesses, including Nichols, and I agree. I affirm the ALJ's credibility findings since he observed the witnesses' demeanor as they testified. *See NLRB v. Walton Mfg. Co.*, 396 U.S. 404, 408 (1962); *Pogue v. United States Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991) (giving great deference to credibility judgments of ALJ who observed the witnesses).

Since I credit Creekmore's testimony that he neither knew about, or condoned, the premature issuance of good guy letters, I also agree with the ALJ's finding that Creekmore did not deliberately cause PSESI to violate the ERA. R. D. and O. at 22. Hence, the provision at 42 U.S.C.A. § 5251(g) does not remove Creekmore's protection under the ERA.[9] *See Drew v. Jersey Central Power & Light Co.*, Case No. 81-ERA-3, ALJ Rec. Dec. and Ord., June 16, 1982, slip op. at 18-19 (denying summary dismissal under § 5251(g) because there was no evidence that the complainant deliberately caused a violation of law), *adopted,* Sec. Dec. and Order, Jan. 13, 1984.

THE REMEDY

A successful ERA complainant is entitled to affirmative action to abate the violation, including reinstatement to his former position, back pay, costs, and attorney fees. 42 U.S.C.A. § 5851(b)(2)(B). The Secretary also may award compensatory damages. *Id.*

I affirm the ALJ's recommendation that PSESI shall immediately expunge from Creekmore's personnel records all derogatory or negative information relating to his employment with Respondent and his layoff on September 10, 1992 and shall

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provide neutral employment references when another firm, entity, organization, or an individual inquires about Creekmore. R. D. and O. at 55.

1. Reinstatement

Creekmore does not desire reinstatement to his former position. Since his current position provides less pay and fewer benefits, however, he is seeking an award of front pay that represents the difference in pay and benefits between the two positions until he reaches age 65. T. 290-291; CX 78. In the alternative, if front pay is not awarded, Creekmore seeks reinstatement.

Front pay is used as a remedy in lieu of reinstatement where the trier of fact finds that a productive and amicable working relationship would be impossible because of animosity or tension between the parties or reduction of the employer s workforce. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 373-374 (3d Cir. 1987); *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, Sec. Dec. and Ord., Nov. 13, 1991, slip op. at 23. A court has reasoned that because "[r]einstatement advances the policy goals of make-whole relief and deterrence in a way which money damages cannot," it is "the preferred remedy in the absence of special circumstances militating against it." *Squires v. Bonser*, 54 F.3d 168, 172-173 (3d Cir. 1995). The First Circuit has acknowledged that reinstatement "often will place some burden on the [employer] since there will likely be tension (or even hostility) between the parties when forcibly reunited," but found that such routinely incidental burdens were insufficient in that case to "tip the scales against reinstatement." *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 322-23 (1st Cir. 1989) (en banc). Another court opined that front pay is appropriate when "[r]etaliation would [be] the order of the day" if the plaintiff were reinstated. *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

Likewise, the Secretary has recognized that hostility in the work environment may mean that reinstatement to the same position in the same location is not appropriate for a successful ERA complainant. In *Boytin v. Pennsylvania Power & Light Co.*, Case No. 94-ERA-32, Dec. and Order of Remand, Oct. 20, 1995, slip op. at 12, the complainant's supervisors regularly chatted with him for approximately two hours a day when they checked his post, but after he engaged in protected activities, they instead stared at him silently for 15 minutes during post checks. Consequently, the Secretary found that "given the hostile working conditions and the degree of animus" at the former work place, the complainant should be given a comparable position at a different location upon reinstatement. *Id.*

In this case, the ALJ found that "tension between the

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parties was manifested in the courtroom as Complainant confronted

and testified against his former superiors, colleagues and coworkers. R. D. and O. at 50. The ALJ declined reinstatement and instead ordered front pay calculated as the present value of 15 years' worth of the difference in salary and pension benefits between Creekmore's former position at PSESI and his new position with TAG. PSESI argues that front pay is not available because Creekmore did not prove that a productive and amicable working relationship would be impossible. Resp. Br. at 37.

In contrast to other cases in which courts have ordered front pay, this record does not reveal unusual work place tension or animosity between Creekmore and his superiors or his coworkers. There were no incidents of flared tempers, strong language, or the like. I find that the observed tension between the parties at the hearing is not sufficient to demonstrate the impossibility of a productive and amicable working relationship in this case. Therefore, front pay is not appropriate here as a substitute for reinstatement.[10] *See Nolan v. AC Express*, Case No. 92-STA-37, Dec. and Remand Order, Jan. 17, 1995, slip op. at 16-17 (award of front pay requires evidence of manifest hostility at work, not simply animosity between parties at the hearing). Accordingly, I shall order PSESI to reinstate Creekmore to the same or a substantially similar position with the same pay and benefits.

2. Back pay

A successful complainant normally is entitled to back pay from the date of termination until reinstatement, less any interim earnings, *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 12, as well as interest on the back pay amount, at the rate specified for underpayment of Federal income tax in 26 U.S.C. § 6621. *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, Oct. 30, 1991, slip op. at 18-19, *aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin,* 982 F.2d 125 (4th Cir. 1992).

Creekmore received severance pay equal to his PSESI salary from September 28, 1992 through May 29, 1993. RDO-MR at 3; CX 10. Consequently, the amount of severance pay shall be offset against the back pay award. *McCuistion*, slip op. at 24.[11]

PSESI argues that the ALJ's back pay award is flawed because it assumes that Creekmore would have continued to be employed by PSESI after the company was sold, restructured, and moved its operations to Florida in 1994. Resp. Mem. in Opp. to Comp. Motion for Reconsideration at 3-4. Since a number of managerial employees were laid off prior to the move to Florida, PSESI contends that it is likely that Creekmore also would have been

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laid off. *Id.* The purpose of a back pay award is to make the employee whole by restoring him to the same position he would have been in if not discriminated against. *Blackburn,* slip op. at 11 and cases there cited. The Secretary has found that "when an employee who was laid off for discriminatory reasons nevertheless would have been laid off for legitimate reasons, back pay would be cut off at the point of the legitimate

layoff." *Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Final Dec. and Order, Nov. 18, 1993, slip op. at 10, *aff'd*, 50 F. 3d 926 (11th Cir. 1995).

PSESI, however, has not demonstrated that Creekmore definitely would have been laid off when the company was sold and relocated. Although some managers were laid off, the managers who took over Creekmore's QA/QC work (Chalfant and Newholm) were not among them. *See* RX 56 at ¶7 (listing the executives and managers who were laid off). Any uncertainties in establishing the amount of back pay are resolved against the discriminating party. *Rios v. Enterprise Ass'n Steamfitters Local No. 638*, 860 F.2d 1168, 1176 (2d Cir. 1988); *Lederhaus v. Donald Paschen*, Case No. 91-ERA-13, Sec. Dec. and Ord., Oct. 26, 1992, slip op. at 10. I therefore find that the back pay period will continue until Creekmore's reinstatement or declination of an offer of reinstatement.

PSESI contends that Creekmore did not mitigate his back pay damages because he declined to be considered for a position with another ABB company at his former rate of pay. Resp. Rebuttal Br. at 10. I find that timing is crucial to this issue. Creekmore explained that he had to accept or reject TAG's offer prior to his scheduled interview with the ABB company. The decision to accept a definite offer rather than declining it to pursue the possibility of an offer at a higher pay rate was appropriate and consistent with Creekmore's obligation to mitigate damages. "An employee is not required to go to heroic lengths in attempting to mitigate his damages, but only to take reasonable steps to do so." *Ford v. Nicks*, 866 F.2d 865, 873 (6th Cir. 1989), *citing Rasimus v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984).

Since the existing record does not include Creekmore's actual earnings since 1993, I am unable to calculate the exact amount of back pay. Accordingly, I shall remand to the ALJ for calculation of the back pay award. When establishing the difference between Creekmore's actual earnings and what he would have earned but for the layoff, his constructive PSESI salary shall include regular annual increases.

3. Benefits

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Reinstatement to his former, or a substantially equivalent, position "together with the . . . terms, conditions, and privileges of employment," 42 U.S.C.A. §5851(b)(2)(B), will require PSESI to restore Creekmore's employee benefits from the time of layoff until reinstatement (or declination). This shallrequire PSESI to restore Creekmore's health, pension, and other related benefits.

PSESI is required to pay medical expenses that Creekmore incurred because of the termination of his PSESI medical benefits, including premiums for family medical coverage while he was seeking permanent employment. T. 262. The ALJ found that the cost of those insurance premiums plus the deductibles paid totaled $1050, R. D. and O. at 16, 51, and I order PSESI to pay that amount.

4. Compensatory damages

To recover compensatory damages, Creekmore had "to show that he experienced mental and emotional distress and that the wrongful discharge caused the mental and emotional distress." *Blackburn v. Martin*, 982 F.2d 125, 131, *citing Carey v. Piphus,* 435 U.S. 247, 263-264 and n.20 (1978). An award "may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action." *Lederhaus v. Paschen,* Case No. 91-ERA-13, Sec. Dec., Oct. 26, 1992, slip op. at 10 and cases there cited. A complainant must prove the existence and magnitude of subjective injuries with competent evidence. *Id., citing Carey v. Piphus,* 435 U.S. at 264 n.20.

Creekmore suffered a heart attack on June 5, 1993, during a hiatus in the hearing. The ALJ found that stress resulting from Creekmore s layoff was the major contributing factor to his heart attack. R.D. and O. at 37. The ALJ recommended an award of $40,000 in compensatory damages for emotional pain, mental anguish and the emotional stress [Creekmore] has experienced herein, as well as the damage to his reputation in the nuclear power industry. R.D. and O. At 53.

The medical evidence in support of the ALJ s conclusion of causation consisted of one paragraph in a brief letter from the treating cardiologist, John P. Parker:

> Based upon Mr. Creekmore s personal and medical history, and my examination of his present medical condition, I believe that the major contributing factor to Mr. Creekmore s present heart attack was the stress he was undergoing as a result of his termination from his employment in September, 1992, and the resulting turmoil in his life. My opinion is based upon my training and experience as a cardiologist and reasonable medical probability.

RX 70. The cardiologist did not testify and therefore he was not subjected to cross examination concerning his opinion.

Respondent s medical expert, Joel M. Gore, a cardiologist on the staff of the University of Massachusetts Medical School, testified and was cross examined at an evidentiary deposition. Gore reviewed Creekmore s medical records and disagreed with Dr. Parker s opinion letter. RX 49. Gore testified that, although in his experience he had many patients who had undergone physical stress and suffered a heart attack shortly thereafter, RX 52 at 14, he was not aware of any studies that have shown that emotional stress per se without underlying cardiac condition or other factors can lead to a heart attack. RX 52 at 9; see *also* at 32-33. Dr. Gore noted that there was no documentation in the medical records of Creekmore s hospitalizations that he was under a great deal of stress. RX 52 at 15. Dr. Gore pointed to Creekmore s elevated cholesterol level, RX 52 at 22-24, abnormal electrocardiogram taken prior to the heart attack, *id.* at 28, strong family history of early coronary heart disease, *id.* at 37, male sex, middle age, and living in the United States, *id.* at 39, as risk factors and risk markers that contributed to Creekmore s heart attack. Dr. Gore concluded that these risk factors and markers

were the reason for Creekmore s heart attack, and that mental stress due to his layoff was not the cause. RX 49.

Notwithstanding my reservations regarding the ALJ s conclusion that Creekmore s heart attack was the natural sequela of his layoff, R.D. and O. At 37, I find that the record contains ample evidence of emotional distress that justifies an award of substantial compensatory damages. Creekmore testified credibly that his layoff caused him embarrassment because in seeking a new job, he had to explain to others in the industry that he had been laid off after 27 years with one employer. T. 283-284. He experienced emotional turmoil due to the disruption to him and his family from his temporary consulting work at a distance from his home and his eventual relocation.

Creekmore also testified that upon his layoff, he panicked about being able to pay his debts and requested distribution of his PSESI retirement fund, thereby incurring substantial taxes and penalties. T. 263-264. Since he had the choice of keeping the retirement contributions invested in a way that would not have caused adverse tax consequences, Creekmore should not be separately compensated for those penalties, as the ALJ recommended. R.D. and O. at 52. Rather, I view his panic as an indication of the emotional turmoil that resulted from his discriminatory layoff.

In light of the demonstrated panic, embarrassment, pain, and suffering, I find that Creekmore is entitled to an award of $40,000 as compensatory damages. *See Gaballa v. The Atlantic*

Group, Case No. 94-ERA-9, Fin. Dec. and Order, Jan. 18, 1996, slip op. at 7 (awarding $35,000 as compensatory damages for emotional distress from blacklisting in violation of the ERA). Interest does not accrue on the compensatory damages award. *See, e.g., Lederhaus*, slip op. at 16; *McCuistion*, slip op. at 24.

5. Costs, expenses, and attorney fees

The ERA provides that the Secretary may award the costs and expenses a complainant reasonably incurred in connection with his complaint. 42 U.S.C.A. § 5251(b)(2)(B). In that regard, the ALJ recommended awarding $2,346 to replace lost wages because Creekmore had insufficient vacation time to attend the hearing and had to take leave without pay from his new job. R. D. and O. at 50. I will not separately award this cost because Creekmore's back pay will cover it. Since his interim earnings were reduced for the time he was on leave without pay, Creekmore's back pay will be higher as a result.

Reimbursable costs include Creekmore's transportation to, and lodging and meals while attending, the hearing. *Tritt v. Fluor Constructors, Inc.*, Case No. 88-ERA-29, Dec. and Ord. of Remand, Mar. 16, 1995, slip op. at 15, *petition for review docketed sub nom. Fluor Constructors, Inc. v. Sec'y of Labor,* No. 95-2827 (11th Cir. June 19, 1995). Accordingly, PSESI must reimburse Creekmore for those costs. On remand, the ALJ shall permit Creekmore to submit evidence documenting these costs, and the ALJ shall recommend the amount to which Creekmore is entitled.

Complainant's attorney submitted two petitions for attorney's fees and costs, to which PSESI did not file responses.

Accordingly, I affirm the ALJ's recommendation of an award of attorney's fees and costs totaling $60,454.74 ($50,941.92, R. D. and O. at 52 and CX 80, plus $9,512.82 in supplemental fees and costs, RDO-MR at 9 and CX 88).

6. Lost equity on Complainant's house

The ALJ recommended an award of $34,500, representing the "lost equity" when Creekmore sold his Connecticut residence and moved his family to Virginia because of his new position with TAG. R. D. and O. at 51; RDO-MR at 6-9. Had Creekmore not been laid off in 1992, and had he remained employed with PSESI when the company relocated to Florida, he would not have been reimbursed for any loss upon the sale of his home. CX 56. There is no record evidence indicating a change in local real estate values between the time Creekmore sold his home in Connecticut (May 1993) and the time PSESI relocated to Florida (September 1994). Therefore I will not award any damages for lost equity.

Nor is Creekmore entitled to payment of $7,500, which the ALJ recommended awarding for "Virginia bank payments for new house." R. D. and O. at 51. Creekmore testified that he made the bank payments to secure a mortgage on his new Virginia residence. T. 261. Since he would have had to obtain a new mortgage if he moved to Florida with PSESI, he is not entitled to a payment that would place him in a better position than if he had not been discriminatorily laid off.

7. Job search expenses

In seeking new employment, Creekmore incurred job search expenses of $2,000 for mailing, telephone, and travel. R. D. and O. at 16. The ALJ correctly recommended awarding these job search expenses, R. D. and O. at 51, and I require PSESI to pay them.

8. Travel expenses to and from Virginia

Finally, the ALJ recommended awarding $2,240 to cover travel expenses for two trips Creekmore's family made to visit him in Virginia prior to the time the family moved and joined him there.

R. D. and O. at 16, 51. Creekmore would not have incurred this expense if he had not been laid off and therefore I affirm the award.

ORDER

1. Respondent shall reinstate Complainant to his former position or a substantially comparable position, together with the same terms, conditions, and privileges of employment.

2. Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information relating to his employment with Respondent and his layoff on September 10, 1992 and shall provide neutral employment references when another firm, entity, organization, or an individual inquires about Complainant.

3. Respondent shall pay Complainant $1050 for medical expenses and $2040 for his family's travel expenses.

4. Respondent shall pay Complainant $40,000 in compensatory damages.

5. Respondent shall pay Complainant's attorney $60,454.74 in costs and attorney's fees.

6. On remand, the ALJ shall determine the amount of back pay

plus interest and the costs for Creekmore's travel, lodging, and meals to attend the hearing. The ALJ shall afford the parties the opportunity to submit evidence on the remanded issues. The ALJ's recommendations on back pay and hearing related costs shall be set forth in a supplemental recommended decision and order.

SO ORDERED.

THOMAS P. GLYNN
Deputy Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Secretary of Labor Robert Reich has recused himself in this case.

[2] The 1992 amendments to the ERA apply to this complaint, which was filed in 1993. See Sec. 2902(I) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-86, 106 Stat. 2776.

[3] Asea Brown Boveri (ABB) acquired Combustion Engineering, Inc. in 1989. PSESI was a wholly owned subsidiary of Combustion Engineering. PSESI was sold to Octagon Inc. in 1984 and the "ABB" portion of its name no longer applies. RX 56. For consistency, Respondent's name is listed in the caption as it appeared in the Administrative Law Judge's decisions.

[4] It would be proper to view the evidence in favor of the non-moving party on a motion for summary decision. *Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, Dec. and Remand Ord., July 17, 1995, slip op. at 5.

[5] *Shusterman* does illustrate the strong deference given to an ALJ's credibility assessments. There, both the ALJ and the Secretary credited respondent's witnesses' testimony that the complainant was selected for layoff because of weak job performance. As I explain below, in this case I agree with the ALJ that PSESI's witnesses were not credible concerning the reason Creekmore was laid off.

[6] I disagree with the ALJ to the extent he questioned PSESI's need to reduce the QA/QC staff. R. D. and O. at 33.

[7] Creekmore, an experienced manager with PSESI, had the same or better "certifications" as Newholm. T. 1170-1171.

[8] Nichols also claimed that in a meeting with her and Creekmore, former PSESI president Wyvill ordered her to falsify good guy letters. T. 424. Both Wyvill, T. 774-775, and Creekmore, T. 1136, vehemently denied her testimony on this issue. Like the ALJ, I do not credit Nichols' testimony.

[9]
That subsection provides:

> (g) Deliberate violations
>
> Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended.

[10] The ALJ recommended awarding front pay in several separate amounts, and all such amounts are rejected here because I have ordered reinstatement to make Creekmore whole. The following sums are disallowed: "lost wages--Atlantic Group" ($34,640), RDR-MR at 4-5; "loss of regular and pension credits" ($146,728), R. D. and O. at 49; "loss growth on pension sum paid" ($177,550), *id.*, and "present value of lost vacation time" ($29,727), RDR-MR at 5-6.

[11] Creekmore also received a payout of his accrued vacation time. PSESI shall afford him the option of buying back the vacation time if he so desires.